UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION**
DREW B. MORVANT, D.D.S.,	)	**No. 93-3251**
	)	**Section K (1)**
and	)	
DREW B. MORVANT, A PROFESSIONAL DENTAL CORPORATION,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE INFORMATION REGARDING HIV STATUS, MEDICAL HISTORY, AND SEXUAL HISTORY

Plaintiff, the United States, submits this memorandum in support of its Motion in Limine to bar inquiries regarding a witness' HIV status, medical history, sexual history, sexual orientation, and prior sexual abuse. As discussed fully below, such information is irrelevant to the material issues in this case and should be excluded under Fed. R. Evid. 401 and 402. In addition, even if the information were relevant, its disclosure would be so unfairly prejudicial as to warrant its exclusion under Fed. R. Evid. 403. Such inquiries should also be barred because the disclosure of that information will have a chilling effect on the enforcement of the Americans with Disabilities Act ("ADA").

I. BACKGROUND

The government contends that Defendants' blanket policy of refusing to treat persons with HIV and AIDS, including Ismael Pena and Russell Hodgkinson, constitutes a violation of Title III of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12181-89.

The government alleges that the following facts are true. Ismael Pena ("Pena") and Patrick Dunne ("Dunne"), who were life partners for 22 years, were long-time dental patients of Defendant Morvant. See Exhs. 1, 4. In November 1992, Dunne went to Morvant's office to have an occlusal night guard fitted. See Exh. 1. During that visit, Dunne informed Morvant that Pena had AIDS. Id.

In February 1993, Pena called Morvant's office to schedule a dental cleaning. See Exhs. 1, 2. Later that day, Pena and Morvant had a telephone conversation, during which Morvant told Pena that, because he had AIDS, he could no longer be treated at Morvant's office. See Exhs. 2, 3. Pena was told that he should instead go to another dentist, Dr. Creely Sturm. See Exh. 2. Pena did not go to Dr. Sturm but chose, instead, to have his teeth cleaning performed at the offices of Dr. Hebert. See Exhs. 5, 6.

Russell Hodgkinson and his wife, Shelly Poncy, have lived in New Orleans since 1992. See Exh. 10. Hodgkinson worked in the same building that housed Morvant's practice. See Exh. 7. In June 1993, he made an appointment to have his teeth cleaned at Morvant's office. See Exh. 7. When he arrived at the office, he

filled out some papers and was then taken into an operatory by Stacey Brown, a dental hygienist. See Exhs. 7, 8. Brown took an oral medical history from Hodgkinson, but did not ask him if he had HIV or AIDS. See Exhs. 7, 8. At the end of the oral history, she asked Hodgkinson if there was anything else about his health that they should know. See Exhs. 7, 8. Hodgkinson told her that he was HIV-positive. See Exhs. 7, 8. Brown then left the operatory and told Morvant of Hodgkinson's status. See Exhs. 2, 7, 8. Morvant instructed her to tell Hodgkinson that, because Hodgkinson was HIV-positive, he could not be treated at their offices, and that he should make an appointment with Dr. Creely Sturm. See Exhs. 2, 7, 8. Hodgkinson subsequently visited the offices of Dr. Sturm, where he had his teeth cleaned. See Exhs. 5, 7, 9.

Although the parties have not identified which fact witnesses they will call at trial, fact discovery closed on January 3, 1995, and depositions of all fact witnesses are now complete.

If this case proceeds to trial, the government likely will call the following persons, among others, in order to prove that the Defendants unlawfully discriminated against Pena: Dunne, Pena's life partner; Kenneth Witkowski and Philip Dynia, two friends of Pena; Ruby Pena, Pena's mother; Celinda Dyess, Pena's sister; Father Henry Willenborg, a religious counselor; Paula Norris, Pena's therapist; and various persons employed by Dr. Morvant. With respect to establishing discrimination against

Hodgkinson, the government likely will call the following persons: Hodgkinson; his wife, Shelley Poncy; Carol Lindsey, Hodgkinson's therapist; and various persons employed by Morvant.

During the course of discovery in this action, Defendants questioned some of the government's witnesses about their sexual history, their sexual orientation, their HIV status, the manner in which Pena and Hodgkinson contracted HIV, the circumstances under which they learned Pena or Hodgkinson were HIV-positive or had AIDS, and the nature of their sexual relationship, if any, with Pena or Hodgkinson. The Defendants sought this information on the grounds that it might somehow lead to the discovery of bias. See Memorandum in Opposition to Plaintiff's Motion for Protective Order. The Defendants likely will seek to use some of this information at trial.

More specifically, the witnesses were asked the following types of questions. Patrick Dunne, Pena's partner, was asked about the following matters: his sexual orientation; the nature of his relationship with Pena; whether he was Pena's lover; when he first became aware that Pena was HIV-positive; and when Pena first told him he was HIV-positive. See Exh. 11.

Kenneth Witkowski and Philip Dynia, two friends of Pena, were asked whether they were HIV-positive. See Exhs. 12, 13. Dynia answered in the negative. See Exh. 12. Witkowski refused to answer the question. See Exh. 13. The government subsequently submitted a declaration of Witkowski which indicated that he did not know his HIV status. See Exh. 14. Defense counsel also asked

Dynia whether he had ever been Pena's lover. See Exh. 12.

Russell Hodgkinson was asked about a number of matters, including sexuality issues raised during treatment by his psychologist, Dr. Melville; his sexual molestation as a young boy; his sexual orientation; sexual addiction; how he contracted the HIV virus; and his marital situation. See Exh. 15.

Shelley Lee Poncy, Hodgkinson's wife, was asked a variety of questions, including whether Hodgkinson told her how he contracted the disease and her HIV status. See Exh. 10.

Pena's mother and sister were both asked whether they knew how Pena contracted the HIV virus. See Exhs. 16, 17. His mother was also asked about Dunne's HIV status and how she and her husband felt about their son's sexual orientation. See Exh. 17.

II. ARGUMENT

A. Information Regarding HIV Status, Medical History, and Sexual History is Irrelevant to the Issues in this Case[1]

In order to prevail in this case, the government must prove that the Defendants own and operate a place of public accommodation; that Pena and Hodgkinson are persons with disabilities with the meaning of the ADA; and that Defendants denied Pena and Hodgkinson dental treatment on the basis of their HIV status.

The Court has already determined that Defendants Dr. Morvant and Drew B. Morvant, A Professional Dental Corporation, own and

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[1] Information regarding HIV status and medical history is

operate a place of public accommodation within the meaning of the ADA. United States v. Morvant, 843 F. Supp. 1092, 1094 (E.D. La. 1994). In addition, it is agreed between the parties that at the time Dr. Morvant sent Pena and Hodgkinson to Dr. Creely Sturm, Pena had AIDS and Hodgkinson was HIV-positive. Thus, the only remaining question in this litigation is whether the Defendants denied Pena and Hodgkinson dental treatment on the basis of their HIV status.

"Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "Evidence which is not relevant is not admissible." Fed. R. Evid. 402. As demonstrated below, information regarding a witness' HIV status and medical history, except with respect to Pena and Hodgkinson, is irrelevant. Information regarding the sexual history of any witness is also irrelevant.

1. The Court Should Exclude, as Irrelevant, Information Concerning a Witness' HIV Status and Medical History, except with respect to Pena and Hodgkinson

Because the government has alleged that the Defendants acted in a discriminatory manner against Pena and Hodgkinson because they were HIV-positive or had AIDS, their HIV/AIDS status is clearly relevant to the resolution of this matter and should be given to the trier of fact. Likewise, information concerning the medical history of Pena and Hodgkinson may be relevant to the

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relevant with respect to Pena and Hodgkinson. See infra.

limited extent that it is probative of the issue of compensatory damages.

However, Pena and Hodgkinson are the only persons whose HIV status and medical history is relevant or of any possible consequence in this lawsuit. Information concerning the HIV status or medical history of any other witnesses, including Dunne, Witkowski, Dynia, and Poncy, none of whom claim to have been refused dental care by Defendants, is of absolutely no consequence to the ultimate issues in this case, either with respect to the material claims or the defenses in this action, and should be excluded as irrelevant. Information concerning the HIV status or the medical history of the other witnesses, including whether they have ever been tested for HIV, simply does not in any way tend to prove or disprove whether Dr. Morvant violated the ADA in the manner alleged in the government's complaint.

Accordingly, unless the Defendants can very clearly demonstrate that information of this kind is relevant to any material issue in this case, the Defendants must be barred from asking witnesses, other than Pena and Hodgkinson, information regarding their HIV status and medical history.

2. The Court Should Also Exclude Information Concerning any Witness' Sexual Orientation and/or Sexual History on Relevancy Grounds

This lawsuit alleges that Dr. Morvant unlawfully discriminated on the basis of a person's HIV or AIDS status, not on the basis of a person's gender, sexual history, or sexual

orientation. Accordingly, information concerning the sexual history of any witness, including information relating to his or her sexual orientation, sexual history, or sexual practices; the manner in which a person may have acquired HIV or AIDS; and the prior sexual abuse of Hodgkinson, also is irrelevant to the ultimate issues in this case: whether the Defendants violated the ADA.

Federal courts, including this Circuit, have excluded information concerning a witness' sexual orientation or sexual history as irrelevant. Indeed, in an action brought under the ADA, in which the plaintiff alleged that the defendant law firm had unlawfully discharged him because of his disability, namely his HIV status, the court instructed the jury that sexual orientation was "absolutely irrelevant to this trial. You should dispel it from your minds. It's a red herring . . . ." Doe v. Kohn, Nast & Graf, No. 93-CV-4510 (E.D. Pa. Oct. 14, 1994). See Exh. 18 (portion of trial transcript for Oct. 14, 1994, pp. 122-136, at p. 136). Similarly, in United States v. Colyer, 571 F.2d 941 (5th Cir.), cert. denied, 439 U.S. 933 (1978), a case involving a fraudulently obtained credit card, the Fifth Circuit upheld the trial's court decision to prevent the complaining witness from answering the question as to whether he was a homosexual because evidence regarding the sexual orientation of the witness would not have been probative of whether the credit card was given to the defendant or stolen by him. Id. at 946 n.7. See also, United States v. Brooks, 928 F. 2d 1403, 1412 (4th

Cir.) (it was not an abuse of discretion to limit inquiries about the "romantic relationship" of two prison inmates when "[s]uch an excursion into that type of relationship had nothing to do with the true issue in the case and was an irrelevant diversion"), cert. denied, __ U.S. __, 112 S.Ct. 140 (1991); United States v. Gillespie, 852 F.2d 475, 478-479 n.2 (9th Cir. 1988) (evidence of a homosexual relationship not relevant where "none of the testimony about their sexual relationship helped the trier of fact decide whether the appellant was guilty of the offense charged"); United States v. Provoo, 215 F.2d 531, 537 (2d Cir. 1954) (inquiry about defendant's homosexuality was irrelevant to the charge of treason for which he was being tried); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., CIV. No. 86-559-FR, 1990 WL 146450, at *2 (D. Or. Sept. 18, 1990) (granting plaintiff's motion in limine to exclude evidence concerning sexual practices of plaintiffs and their witnesses in an abortion rights case). Therefore, the Defendants should be barred from asking witnesses that information pursuant to Fed. R. Evid. 401 and 402.

B. **Information regarding one's HIV status, medical history, or sexual history is not probative of personal bias, prejudice, or motive**

During discovery, Defendants questioned various deponents about such matters as their HIV status, their sexual history, and the nature of their relationship, if any, with Pena and Hodgkinson, in order to establish whether these witnesses harbored any bias in favor of Pena or Hodgkinson or the

government.

With respect to HIV status, Defendants assert that if a fact witness is HIV-positive that witness will have a vested interest in eliminating discrimination against others who are HIV-positive and will, on that basis alone, bias their testimony in this case in favor of the government and against Dr. Morvant. As set forth below, that assertion is not supported by the law.

However, even assuming arguendo, that Defendants' assertion was true, none of the governments witnesses questioned by Defendants stated that they were, in fact, HIV-positive. Quite the opposite. Upon questioning by Defendants, the witnesses testified either that they were not HIV-positive or that they did not know their HIV status. Thus, the Defendants have their answers and those answers do not support Defendants' bias theory. Knowing that, there can be no good faith reason for asking those same witnesses their HIV status in front of the jury other than to attempt to embarrass the witness and inflame the jury.

Likewise, Defendants asked Dynia whether he had ever had a sexual relationship with Pena. He said that he had not. Again, Defendants have their answer and there can be no good faith reason for asking those questions in front of the jury. The only possible reason would be to inflame the jury.

In this circuit, bias has been defined as "[a]ny incentive a witness may have to falsify his testimony." United States v. Leslie, 759 F.2d 366, 379 (5th Cir. 1985). However, information about a witness' sexual history or sexual orientation has no

bearing on his or her propensity to tell the truth under oath and "[i]t would indeed [be] wrong to permit cross-examination on the score of homosexuality merely to discredit." United States v. Nuccio, 373 F.2d. 168, 171 (2d Cir. 1967), cert. denied, 387 U.S. 906 (1967). See also United States v. Colyer, 571 F.2d 941 (5th Cir.) (evidence as to whether the complaining witness was a homosexual would have nothing to do with his credibility as a witness), cert. denied, 439 U.S. 933 (1978); United States v. Boylan, 898 F.2d 230, 255 n.14 (1st Cir.)(homosexuality or sexual preference has nothing to do with testimonial honesty), cert. denied 498 U.S. 849 (1990); Eastwood v. Dept. of Corrections of State of Okla., 846 F.2d 627, 631 (10th Cir. 1988) (sexual history is in no way probative of witness' veracity); Provoo, 215 F.2d at 537 (there is no authority "which suggests that homosexuality indicates a propensity to disregard the obligation of an oath"); United States v. Wright, 489 F.2d 1181, 1184, 1186 (D.C. Cir. 1973) (evidence of homosexuality completely unrelated testimonial honesty).

The government acknowledges that evidence of a relationship between a party and a witness may be relevant for purposes of establishing possible bias.[2] Thus, the jury is entitled to hear information that may evidence bias, including the fact that Pena

[2] "Relationships between a party and a witness are always relevant to a showing of bias whether the relationship is based on ties of family, sex - heterosexual or homosexual - employment, business, friendship, enmity or fear." 3 J. Weinstein & M.Berger, Weinstein's Evidence, ¶ 607[03] at 607-37 to 607-39 (1993 ed.)

and Dunne lived together in a relationship that lasted 22 years. The jury also is entitled to hear about the extent to which that relationship may have influenced events that are material to this lawsuit. Likewise, the Defendants also should be able to explore the fact that Witkowski and Dynia were friends of Pena, to explore the attitudes and beliefs of the witnesses, to question their motives for testifying in this case, and to ascertain whether they have anything to gain by testifying. The same is true with respect to Pena's family and with respect to Hodgkinson and his wife.

However, as long as the jury has been given a reasonable opportunity to make a discriminating appraisal of the witnesses' credibility, bias, and particular motives in testifying, there is absolutely no reason for asking witnesses in this case about their HIV status, their medical history, or the intimate details of their personal lives and sexual history.

> Defendants cannot run roughshod, doing precisely as they please simply because cross-examination is underway. So long as a reasonably complete picture of the witness' veracity, bias, and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries.

Boylan, 898 F.2d at 254; see also United States v. Tansley, 986 F.2d 880, 886 (5th Cir. 1993); Greene v. Wainwright, 634 F.2d 272, 275 (5th Cir. 1981). Thus, in Boylan, the First Circuit upheld the trial court's decision to preclude cross-examination of certain government witnesses about the recruitment of male prostitutes and whether a witness was homosexual because the defense had been given ample opportunity to explore in detail the

witnesses' grant of immunity and the bribery at issue, "the essential factors shedding light on the witnesses' testimonial incentives and veracity". Id. at 255. "Only the sex related trimmings were placed off limits." Id.

Proffered evidence must tend to show that the bias is more or less probable than it would be without the evidence. Mills v. Estelle, 552 F.2d 119 (5th Cir.), cert. denied, 434 U.S. 871 (1977). Thus, in United States v. Wright, 489 F.2d 1181, the Court held that it was not an abuse of discretion to exclude evidence that a robbery victim may have made a prior homosexual advance toward the defendant, as evidence of bias, because the evidence was ambiguous and susceptible to misinterpretation. Id. at 1186. Here, there simply is no demonstrable basis for the claim that the HIV status of witnesses will influence the witness to testify other than truthfully.

C. Even if Information Concerning HIV Status, Sexual Orientation or Sexual History Has Some Limited Relevance or Probative Value, Such information is unfairly prejudicial and should be excluded under Fed. R. Evid. 403.

Even assuming, arguendo, that information concerning HIV status or sexual history has some probative value, that value is substantially outweighed by the unfair prejudice that would ensue to the government and to some of its witnesses if such information is disclosed. Accordingly, the Court should exclude that information pursuant to Fed. R. Evid. 403.

Fed. R. Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially

> outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Thus, the court must undertake an assessment of whether the probative value of the proffered evidence is substantially outweighed by the harm that is likely to result if the evidence is admitted because of the unfairly prejudicial nature of the evidence or on account of one or more of the other countervailing factors.

Without question, information regarding a witness' HIV status, medical history, and/or sexual history has the potential to be unfairly prejudicial to the government's case and its witnesses. "Unfair prejudice" within the meaning of Rule 403 occurs when the evidence has "an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee note. It is evidence which "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish," or otherwise "may cause a jury to base its decision on something other than the established propositions in the case." 1 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 403[03] at 403-37 to 403-49 (1993 ed.).

There can be no doubt that information regarding a person's HIV status has a great propensity to adversely influence the jury's decision-making process. "Ignorance and prejudice concerning the disease are widespread." Doe v. Coughlin, 697 F.

Supp. 1234, 1238 (N.D.N.Y. 1988).[3]

Similarly, information about sexual history, sexual orientation, and Hodgkinson's sexual abuse as a child, has a substantial potential to unfairly prejudice and harm the perceived credibility of the government's witnesses by provoking an inappropriate emotional response in the jury and otherwise affecting adversely the jury's assessment of the witness' testimony. This harm is especially significant with respect to information regarding a witness' sexual orientation. The stigma and social ostracism attached to homosexuality is legion. Justice William Brennan put it succinctly: "homosexuals have historically been the object of pernicious and sustained hostility." Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (dissenting from denial of cert.). Defendants may argue that Hodgkinson's experience of being sexually abused as a child is somehow relevant to his claim for damages in this case. If Defendants can carry the heavy burden of demonstrating that, the government will ask for a limiting instruction.

Federal courts have wisely exercised their discretion to exclude evidence of sexual history, including sexual orientation, under Fed. R. Evid. 403, when that evidence has had little probative value in the case and has had a great propensity to

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[3] Indeed, the courts have noted that "no disease in modern history has engendered so much attention, fear, and even hysteria as AIDS," Snyder v. Mekhjian, 593 A.2d 318, 323 (N.J. 1991)(Pollock, J., concurring) and have likened the virus to "the modern day equivalent of leprosy." Rasmussen v. South Fla. Blood Serv., 500 So.2d at 533, 538 (Fla. 1987).

unfairly prejudice the outcome of the jury's decision-making process. In Boylan, supra, the court found that the trial court properly excluded evidence about a witness' sexual preference "[g]iven the marginal value of sexual preference testimony and its potential to distract the jury from the legitimate issues of the case." Id. at 255. The First Circuit cited with approval the remarks of the trial judge who struck a question propounded by the defense attorney which referred to a witness's sexual preference.

> Everybody in this room knows that mentioning homosexuality, accusing someone of homosexuality has such a proclivity, such a tendency to debase and humiliate a witness. . . . It has nothing to do with testimonial honesty. . . . In my judgment [the question] was offered for purpose of humiliating and degrading the witness. . . . It's not worth a hill of beans, compared to the probative value it offers. It has absolutely no value in this case. . . .

Boylan, 898 F.2d at 255 n.14.

The Fifth Circuit has acted in a similar vein. For example, in Porretto v. Stalder, 834 F.2d 461, 465 (5th Cir. 1987), the Court of Appeals affirmed a ruling by the Louisiana Supreme Court that the trial court's exclusion of testimony attempting to establish the existence of a homosexual relationship was proper. Similarly, in United States v. Davila, 704 F.2d 749, 753 (5th Cir. 1983), this Circuit upheld the exclusion of evidence that the government's witness had engaged in prostitution as prejudicial and because "whatever probative value lay in the evidence as to possible prostitution was minuscule and the potential for confusion was substantial." In another case which

involved convictions for mail and wire fraud and conspiracy, the Court of Appeals found it was reversible error not to exclude evidence of a sexual relationship between two co-conspirators because of its prejudicial aspects. United States v. Frick, 588 F.2d 531, 537-538 (5th Cir.), cert. denied, 441 U.S. 913 (1979).

Of particular note is the fact that this Circuit also has ruled that information concerning the contraction of a sexually transmitted disease was not probative of the material issues in the case. In Re Air Crash Disaster Near New Orleans, La., 767 F.2d 1151, 1154 (5th Cir. 1985). Thus, in a wrongful death action brought on behalf of a deceased spouse, the Court upheld the trial court's refusal to admit evidence that the witness had contracted venereal disease during his marriage because the evidence was probative of "nothing more" than that he had been unfaithful to his wife and the potential prejudice of that information outweighed its value. Id. at 1154. Thus, there is simply no reason to explore how Pena or Hodgkinson contracted the HIV-virus because it is absolutely irrelevant to the claims asserted here and the information sought is, presumably, calculated to leave the jury with the impression that they were "bad characters."

Similar precedent can be found in other circuits as well. See, e.g., Cohn v. Papke, 655 F.2d 191, 194-195 (9th Cir. 1981) (trial court abused its discretion by permitting inquiries concerning prior sexual experiences and sexual orientation because evidence was "of very slight probative value" and there

"was a clear potential that the jury may have been unfairly influenced by whatever biases and stereotypes they might hold with regard to homosexuals or bisexuals"); Gillespie, 852 F.2d at 478-479 (because evidence of homosexuality is "extremely prejudicial," it was reversible error to admit evidence from which the jury could infer that the defendant had a homosexual relationship where the verdict "probably depended on the jury's assessment of the credibility and character" of the accused and a prosecution witness); United States v. Millen, 594 F.2d 1085, 1088 (6th Cir.) (defendant's conviction for involuntary manslaughter reversed where government failed to present any evidentiary basis for testimony that there was a homosexual relationship between the defendant and the homicide victim and it was clear the "prejudicial aspect of the answer given far outweighed any obvious or apparent probative value" of the information), cert. denied, 444 U.S. 829 (1979).

Accordingly, in assessing the probative value of information regarding HIV status, medical history, and sexual history in relation to the unfairly prejudicial nature of that information, the Court should, absent extraordinary circumstances, bar inquiry into such areas pursuant to Fed. R. Evid. 403.

D. Allowing disclosure at trial of information concerning HIV Status, sexual orientation and sexual history will have a chilling effect upon the enforcement of the ADA

Finally, allowing the disclosure of information regarding highly personal matters such as HIV status and sexual history will have a chilling effect upon the enforcement of the ADA.

Indeed, the potential for disclosure of such information at trial will deter individuals from bringing HIV discrimination cases in the first instance and deter witnesses who may have material information about this case and others from coming forward.

The potential for chilling effect here is similar to that recognized in both rape and sexual harassment cases. In advocating the passage of the Privacy Protection for Rape Victims Act (codified at Fed. R. Evid. 412), which prohibits inquiries into a rape victim's sexual history, Congress Holtzman argued:

> Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself . . . it is not surprising that [rape] is the least reported crime.

124 Cong. Record at p. H11944 (Oct. 10, 1978). More recently, in a federal sexual harassment case, the court prohibited inquiries into the plaintiff's prior sexual activities during discovery, noting that:

> Discovery of intimate aspects of plaintiffs' lives, as well as those of their past and current friends and acquaintances, has the clear potential to discourage . . . litigants from prosecuting lawsuits such as the instant one. For those more hearty souls who are determined to have their day in court, it has the potential to annoy and harass them significantly.
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> . . .
>
> The possibility that discovery tactics such as that used by defendant herein might intimidate, inhibit, or discourage Title VII plaintiffs . . . from pursuing their claims would clearly contravene the remedial effect intended by Congress in enacting Title VII, and should not be tolerated by the federal courts. In fact, it was to empower federal courts to prevent such unjust effects that Rule 26(c) of the Federal Rules of Civil Procedure was enacted.

Priest v. Rotary, 98 F.R.D. 755, 761 (N.D. Cal. 1983).

As demonstrated herein, the information concerning HIV status, sexual history and/or sexual orientation is fiercely private, the disclosure of which can unfairly prejudice the outcome of this case. Unless individuals can be assured that their privacy interests in such information will be protected, few people will be willing to come forward with complaints alleging discrimination on the basis of HIV or AIDS, to pursue their rights under the ADA, or to testify in these cases. Nor should they have to. To hold otherwise contravenes the remedial effect intended by Congress in enacting the statute. See Kinney v. Yerusalim, 812 F. Supp. 547, 551 (E.D. Pa.) ("The ADA is a remedial statute, designed to eliminate discrimination against the disabled in all facets of society."), aff'd, 9 F.3d 1067 (3d Cir. 1993), cert. denied, __ U.S. __, 114 S.Ct. 1545 (1994); 101 S. Rep. 116, 101st Cong., 1st Sess. 8 (1989) (noting the testimony of Admiral James Watkins, former chairperson of the President's Commission on the Human Immunodeficiency Virus Epidemic, that "fear of discrimination . . . will undermine our efforts to contain the HIV epidemic and will leave HIV-infected individuals isolated and alone").

E. The Court has the Power to Protect Witnesses from Harassment and Undue Embarrassment

The Court has the discretion pursuant to Fed. R. Evid. 611(a) to control the mode of interrogating witnesses and presenting evidence so as to protect witnesses from harassment or

undue embarrassment.[4] Colyer, 571 F.2d at 946-947 n.7.

There are few matters of a more personal and private nature than information pertaining to one's HIV status and medical history. See, e.g., Woods v. White, 689 F. Supp. 874, 876 (W.D. Wis. 1988) ("[g]iven the most publicized aspect of the AIDS disease, namely that it is related more closely than most diseases to sexual activity . . ., it is difficult to argue that information about this disease is not information of the most personal kind"), aff'd, 899 F.2d 17 (7th Cir. 1990); Doe v. Coughlin, 697 F. Supp 1234, 1237 (N.D.N.Y. 1988)("[i]n the court's view there are few matters of a more personal nature" than having tested positive for HIV).

Federal courts have repeatedly acknowledged that there is a constitutionally-protected privacy interest "in avoiding disclosure of personal matters," Whalen v. Roe, 429 U.S. 589, 598-600 (1977), including information about one's medical condition and other information of a distinctly personal nature. See, e.g., Fadjo v. Coon, 633 F.2d 1172, 1174 (5th Cir. 1981) ("the most private details of [plaintiff's] life" provided during criminal investigation); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) (information about one's body and state of health); Inmates of New York State with Human Immune Deficiency Virus v. Cuomo, No. 90-CV-252, 1991 WL 16032 at

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[4] Fed. R. Evid. 611(a) provides:
> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . . (3)protect

*3 (N.D.N.Y. Feb. 7, 1991) ("the federal Constitution protects against the unwarranted and indiscriminate disclosure of the identity of HIV-infected individuals and of their medical records").

Accordingly, because the disclosure of information of this sort has the obvious potential to harass and embarrass witnesses in this case, the court should, if necessary, exercise its power pursuant to Rule 611(a) to bar such inquiries.

III. CONCLUSION

For the reasons set forth in this Memorandum, the United States respectfully requests that this Court grant the motion in limine and prohibit inquiries concerning HIV status, medical history, and sexual history from (1) inquiring into the HIV status of any witness in this matter except Pena or Hodgkinson; inquiring into the sexual history of any witness in this matter, including any inquiries into that person's sexual orientation, sexual practices, and/or sexual abuse; and (3) inquiring into the medical history of all witnesses, except with respect to Pena and Hodgkinson and then, only to the extent that medical history is probative of the issue of damages.

Respectfully submitted,

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witnesses from harassment or undue embarrassment.

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